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<b>C.B., (widow of S.B.), Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0994</b>
	)	<b>Issued: August 9, 2021</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>WAINWRIGHT MEMORIAL MEDICAL</b>	)	
<b>CENTER, Walla Walla, WA, Employer</b>	)	
	)	

*Case Submitted on the Record*

## DECISION AND ORDER

Before:  
 JANICE B. ASKIN, Judge  
 PATRICIA H. FITZGERALD, Alternate Judge  
 VALERIE D. EVANS-HARRELL, Alternate Judge

## JURISDICTION

On April 9, 2020 appellant, through counsel, filed a timely appeal from a March 12, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether a schedule award, pursuant to the provisions of section 8107 of the Federal Employees' Compensation Act,<sup>3</sup> (FECA) may be granted posthumously where maximum medical improvement of the injured member had not been reached during the lifetime of the employee.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On April 10, 2013 the employee, then a 45-year-old housekeeping aid supervisor, filed a traumatic injury claim (Form CA-1) alleging that on March 19, 2013 he injured his lower back when he lifted a desk while in the performance of duty. OWCP accepted his claim for left thoracic or lumbosacral neuritis and subsequently expanded the acceptance of his claim to include postlaminectomy syndrome. It paid the employee wage-loss compensation on the supplemental rolls for intermittent periods of total disability beginning February 5, 2016.

The employee underwent several OWCP approved back surgeries and was intermittently on and off work.<sup>5</sup> November 28, 2016 he returned to full-time, modified-duty work. The employee continued to receive medical treatment.

On August 1, 2017 the employee filed a claim for compensation (Form CA-7) for a schedule award.

Appellant submitted an August 22, 2016 report by Dr. Jason A. Dreyer, an osteopath who specializes in neurosurgery. Dr. Dreyer recounted the employee's complaints of recurrent, severe low back pain. He noted improved sensory examination and motor examination and diagnosed status post L5-S1 fusion.

In a development letter dated August 10, 2017, OWCP requested that the employee's treating physician submit an impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>6</sup> and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth*

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<sup>3</sup> *Id.* at § 8107.

<sup>4</sup> Docket No. 19-0866 (issued September 17, 2019).

<sup>5</sup> Appellant underwent L2-3 microdiscectomy with L3-4 laminectomy and decompression on October 28, 2014, anterior lumbar interbody and posterolateral arthrodesis at L1-2, L2-3, and L3-4, posterior spinal instrumentation at L1-S1, laminectomies at L1-5 to S1 for compression on January 19, 2016, and hardware removal and revision with posterolateral fusion at L4-5, L5-S1 on August 22, 2016.

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

*Edition* (July/August 2009) (*The Guides Newsletter*). It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

OWCP received a July 11, 2017 report by Dr. Kyle Terry, a family medicine specialist, who indicated that the employee was evaluated for complaints of continued low back and left testicle pain. It also received a June 29, 2017 progress note by Dr. Michael Turner, a Board-certified physical medicine and rehabilitation specialist, who indicated that the employee's electromyography and nerve conduction velocity (EMG/NCV) study was normal.

In an April 4, 2017 letter, Dr. John B. Hoehn, who specializes in family medicine, noted that the employee had reached maximum medical improvement (MMI).

In an August 14, 2017 report, Dr. Craig Flinders, a Board-certified family medicine specialist, noted the employee's complaints of chronic severe left testicle and low back pain. He discussed the employee's history and noted that the employee only had minimal improvement in pain and function. Upon examination of the employee's lumbar spine, Dr. Flinders observed moderate paraspinal tenderness in the same region and positive Patrick's test bilaterally. He diagnosed degenerative joint disease with discogenic lumbar radiculopathy.

An August 29, 2017 lumbar x-ray scan revealed stable changes of operative fusion extending from L1 through S1 and possible left renal calculus.

OWCP also received a January 19, 2016 operative report, an August 22, 2016 operative report, laboratory test results dated August 28, 2017, thoracic transforaminal epidural steroid injection procedure reports dated September 28 and October 18, 2017, and an October 19, 2017 work status note.

A December 5, 2017 lumbar spine magnetic resonance imaging (MRI) scan report revealed progressive degenerative disc disease and mild retrolisthesis at T12-L1 with moderate central canal stenosis.

In reports dated December 26, 2017 through February 13, 2018, Dr. Terry noted that the employee was doing better, but still had pain in his back and legs. He provided examination findings and noted decreased muscle tension throughout the bilateral lower thoracic and lumbar paraspinals. In a January 8, 2018 report, Dr. Terry indicated that the employee had asked about his impairment rating. He explained that Dr. Flinders had recommended another surgery before he could complete a report. Dr. Terry noted that, since the employee was still seeking curative medicine, he did not submit the employee findings.

On February 16, 2018 OWCP advised the employee that it would not take additional action on his schedule award claim because the medical evidence of record demonstrated that his condition had not yet reached MMI.

In a February 20, 2018 report, Dr. Flinders noted the employee's complaints of left groin and testicle pain. He provided examination findings and diagnosed chronic low back pain status posterolateral interbody fusion at L1 to S1 for degenerative disc disease.

On February 27, 2018 the employee underwent OWCP-authorized lumbar surgery. He stopped work and OWCP paid him wage-loss compensation on the supplemental rolls until he returned to part-time, limited-duty work on March 16, 2018.

In a March 1, 2018 report, Dr. Andrew Park, a Board-certified family medicine specialist, discussed the employee's history of injury and noted the employee's complaints of low back pain, left testicle pain, and numbness and pain in the left thigh. He provided examination findings and diagnosed lumbar radiculopathy, status post multiple surgeries.

In a March 15, 2018 work capacity evaluation report (Form OWCP-5c), Dr. Flinders indicated that the employee could work part time with restrictions for four hours per day.

By decision dated March 26, 2018, OWCP denied the schedule award claim, finding that the medical evidence of record was insufficient to demonstrate that the employee had reached MMI. It noted that the evidence of record demonstrated that he was still receiving medical treatment for his accepted condition.

OWCP subsequently received a March 21, 2018 report by Dr. Park, who recounted that the employee still complained of left testicle pain after the February 27, 2018 surgery. Dr. Park indicated that examination of the employee's lumbar spine revealed decreased range of motion (ROM) and mild tenderness in the lower paraspinal areas. He diagnosed lumbar radiculopathy, thoracolumbar radiculopathy, and myofascial pain syndrome.

The employee continued to receive medical treatment from Dr. Flinders. In reports and a Form OWCP-5c dated March 20 through June 26, 2018, Dr. Flinders noted that the employee had recently undergone endoscopic discectomy surgery and continued to complain of back pain. Upon physical examination, he observed minimal tenderness and prominent trigger points in the interspinous ligament at T6-7. Dr. Flinders diagnosed postlaminectomy pain syndrome with chronic back pain, left T12 radicular pain, and myofascial pain. In a May 29, 2018 report, he recommended that the employee consider a trial of spinal cord stimulation for the employee's chronic residual symptoms. In a June 26, 2018 report, Dr. Flinders recommended that the employee remain off work.

In reports and OWCP-5c forms dated May 2 through June 1, 2018, Dr. Park recounted the employee's complaints of increasing back pain and left testicle numbness and pain. He provided examination findings and diagnosed thoracolumbar radiculopathy, myofascial pain syndrome, and lumbar radiculopathy. Dr. Park noted that the employee could work full-time, limited duty.

OWCP received emergency department hospital records dated June 19, 2018 and an urgent care report dated June 20, 2018, which revealed that the employee sought medical treatment for back pain and sciatica-like symptoms down the left leg. The employee was diagnosed with lumbar strain and left side sciatica.

On August 7, 2018 appellant, the employee's widow, notified OWCP that the employee had passed away on August 6, 2018 and provided a death certificate dated August 13, 2018.

OWCP subsequently received reports dated July 3 and August 2, 2018, wherein Dr. Park noted that on March 9, 2013 the employee injured his back at work and discussed the numerous

surgeries that he underwent. Dr. Park recounted the employee's complaints of persisting low back pain, left testicle pain and numbness, and occasional sciatica-type pain radiating to the left leg. Upon physical examination of the employee's back, he observed decreased range of motion and mild tenderness in the lower paraspinal area. Neurological examination revealed decreased and no sensation of L1 dermatome left groin and left thigh area. Dr. Park assessed thoracolumbar radiculopathy, myofascial pain syndrome, restless leg syndrome, and lumbar radiculopathy.

OWCP received various medical reports dated from July 11, 2016 through February 2, 2017 regarding the employee's treatment for chronic lower back pain, lumbar disc disease, lumbar radiculitis, sleep apnea, fatigue, and restless leg syndrome. It also received a February 7, 2013 and December 1, 2016 sleep study note and testing report. On February 6, 2019 appellant, through counsel, requested reconsideration of the March 26, 2018 decision. Counsel alleged that the death of the employee placed him at MMI and that OWCP had a duty to develop the schedule award claim.

By decision dated February 20, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

Appellant filed an appeal to the Board. By decision dated September 17, 2019, the Board set aside OWCP's February 20, 2019 nonmerit decision,<sup>7</sup> finding that counsel provided a new legal argument relevant to the employee's schedule award claim.

Appellant, through counsel, thereafter submitted a March 3, 2020 letter and requested an update from OWCP regarding the employee's schedule award claim.

By decision dated March 12, 2020, OWCP denied modification of the March 26, 2018 schedule award decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>8</sup> and its implementing federal regulations<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and

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<sup>7</sup> *Supra* note 3.

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

the Board has concurred in such adoption.<sup>10</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.<sup>11</sup>

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury entitling him or her to a schedule award.<sup>12</sup> Before the A.M.A., *Guides* can be utilized, a description of impairment must be obtained from his or her physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decrease in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>13</sup>

Section 8109(a) of FECA provides that if an individual has sustained disability compensable under section 8107(a), has filed a valid claim in his lifetime, and dies from a cause other than the injury before the end of the period specified by the schedule, the compensation specified by the schedule that is unpaid at his death, whether or not accrued or due at his death, shall be paid, under an award made before or after the death and for the period specified by the schedule, to designated surviving beneficiaries.<sup>14</sup>

OWCP procedures further provide that, if at the time of the claimant's death a schedule award claim is being developed, but has not yet been paid, the claimant's dependent(s) would be entitled to the entire payment of the award.<sup>15</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In the instant case, the Board finds that OWCP erred in denying appellant's schedule award claim based solely on its finding that the employee had failed to establish that he had reached MMI. The record reflects that the employee made a claim for a schedule award during his lifetime and the claim was under development. OWCP initially denied the employee's schedule award claim, finding that the evidence of record failed to establish that he had reached MMI. The

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<sup>10</sup> *Id.* at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>12</sup> *See M.G.*, Docket No. 19-0823 (issued September 17, 2019); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>13</sup> *K.F.*, Docket No. 18-1517 (issued October 9, 2019); *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

<sup>14</sup> 5 U.S.C. § 8109(a).

<sup>15</sup> *Supra* note 11 at Chapter 2.808.7(a)(7) (February 2013).

employee subsequently passed away on August 6, 2018. On February 6, 2019 appellant, through counsel, requested reconsideration. By decision dated March 12, 2020, OWCP denied modification of the March 26, 2018 schedule award decision, finding that the medical evidence of record was insufficient to demonstrate that the employee had reached MMI.

The Board has found that a disabled employee has the right to compensation for periods of temporary total or partial disability until MMI is reached. Upon reaching MMI, the evidence ordinarily permits a determination to be made as to the precise degree of permanent loss of use of the schedule member of the body. However, the Board has held that, in cases involving posthumous schedule awards, precision often cannot be obtained. In those situations, schedule awards have been made in other jurisdictions where the evidence shows the extent of permanent impairment. Evidence based on conjecture, of course, would not meet the required standard of proof. However, where a physician, within a reasonable degree of medical certainty, is able to render an opinion as to the permanent loss of use of the injured member, such evidence should be given credence. Although in a particular case there may be a conflict as to the extent of the impairment, this would present a question of fact which, as in any other case, would be resolved by weighing the evidence.<sup>16</sup>

In its March 12, 2020 decision, OWCP summarily denied appellant's schedule award claim without evaluating the medical evidence in the record to determine if the additional medical evidence supported a permanent impairment rating.

The Board notes that, prior to the employee's death, he submitted reports by Dr. Park. In reports dated July 3 and August 2, 2018, Dr. Park described the March 9, 2013 employment injury and discussed the numerous surgeries that the employee underwent. He noted lumbar examination findings of decreased range of motion and mild tenderness in the lower paraspinal area. Neurological examination revealed decreased and no sensation of L1 dermatome left groin and left thigh area. Dr. Park diagnosed thoracolumbar radiculopathy, myofascial pain syndrome, restless leg syndrome, and lumbar radiculopathy. The Board notes that he provided lumbar examination findings and noted diminished sensation in appellant's left lower extremity. Because Dr. Park noted physical findings at the time of his last examination of the employee on July 3, 2018, OWCP erred by not further developing the medical evidence for review of the employee's permanent impairment to his left lower extremity due to his accepted lumbar injury in accordance with the A.M.A., *Guides*.<sup>17</sup>

OWCP's procedures provide that, if a claimant does not provide an impairment evaluation from his/her physician when requested and there is an indication of permanent impairment in the medical evidence of file, the claims examiner (CE) should refer the claimant for a second opinion

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<sup>16</sup> Cheryl R. Holloway (Wryland R. Holloway), Docket No. 02-2153 (issued February 28, 2003).

<sup>17</sup> *Id.*

evaluation.<sup>18</sup> The CE may also refer the case to the DMA prior to scheduling a second opinion examination.<sup>19</sup>

The case shall, therefore, be remanded for OWCP to consider the existing medical evidence of record in order to determine whether any specific finding of permanent impairment can be identified when the A.M.A., *Guides* are applied to the predeath physical findings. OWCP should refer the results of Dr. Park's reports to an OWCP medical adviser for calculation of the employee's permanent impairment. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* merit decision regarding the posthumous schedule award claim.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 12, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 9, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> *Supra* note 11 at Chapter 2.808.6(d) (March 2017).

<sup>19</sup> *Id.*